Circuit Court for Baltimore City
Case No. 119009007

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2423

September Term, 2019

LORENZO KEVIN TERRY,

v.

STATE OF MARYLAND.

Fader, C.J.,
Leahy,
Reed,

JJ.

Opinion by Leahy, J.

Filed: September 13, 2021

Following a mistrial and just prior to jury selection in his second trial, Lorenzo Kevin Terry ("Mr. Terry") filed a motion to dismiss his criminal case on double jeopardy grounds in the Circuit Court for Baltimore City. Mr. Terry brings this interlocutory appeal challenging the denial of his motion.

Mr. Terry is charged with multiple counts stemming from a shooting incident that occurred on November 17, 2018. He faces two counts of attempted first-degree murder, two counts of attempted second-degree murder, two counts of assault in the first-degree, one count of use of a firearm in the commission of a violent crime, two counts of assault in the second-degree, reckless endangerments, possession of a handgun, and discharging a firearm.

Based on these charges, Mr. Terry appeared in the circuit court for the first day of trial on October 10, 2019 when the jury was empaneled, instructed, and sworn. On the second day, the parties presented opening statements and two crime lab technicians testified on behalf of the State about their examination of the crime scene. Next, Detective Rahim Williams ("Det. Williams") testified, outside the presence of the jury, on an evidentiary issue raised during argument on the State's Motion to Amend the Witness List. Upon questioning, Det. Williams revealed that he had failed to disclose two video interviews to the assistant state's attorney. One video was from an interview of Mr. Terry. The other video was from an interview of Robert Rader, who was in the area at the time the shooting occurred on November 17, 2018.

Mr. Terry moved to dismiss his case with prejudice under Maryland Rule 4-263 due to the State's discovery violations and failure to disclose the witness statements. On

October 15, 2019, the circuit court heard argument on that motion. At the conclusion of the hearing, the court denied the motion but declared a mistrial *sua sponte*, finding that there was a violation of Mr. Terry's due process rights and that a new trial was warranted.

On January 7, 2020, before the start of a new trial before a different judge, Mr. Terry renewed his motion to dismiss the case on double jeopardy grounds, arguing that there was no "manifest necessity" for the prior judge to declare a mistrial. After reviewing the record and the circumstances that led to the declaration, the judge concluded that he would not dismiss the matter and found no error in the prior judge's rationale for declaring a mistrial.

Mr. Terry presents the following questions for our review:

1. "Did declaring a mistrial based on [the S]tate's 'mistake' of failing to disclose statements, rather than a finding of manifest necessity, violate Mr. Terry's right to due process?"

2. "Did the court violate Mr. Terry's right to due process by misapplying the factors for sanctioning a discovery violation?"

We conclude that the trial judge did not abuse her discretion in declaring a mistrial based on manifest necessity. Applying the factors articulated in *State v. Baker*, 453 Md. 32, 49 (2017), to the record before us, we hold that the judge weighed the unique facts and circumstances in Mr. Terry's case, explored reasonable alternatives to declaring a mistrial, and then properly determined that no reasonable alternative to declaring a mistrial existed. We also conclude that the circuit court, in the underlying (second) action, carefully considered the same record and did not err in denying Mr. Terry's motion to dismiss on double jeopardy grounds. We further conclude that Mr. Terry is not entitled to an interlocutory appeal of the court's discovery ruling during the first trial because the

discovery ruling was not a final judgment and did not fall within one of the exceptions to the final judgment rule. We, therefore, affirm the judgment of the circuit court.

BACKGROUND

Our summary of the trial record is curtailed to those facts necessary for our discussion of the issues raised in this interlocutory appeal.

On November 29, 2018, Det. Williams submitted an "Application for Statement of Charges" to the District Court of Baltimore City naming Lorenzo Kevin Terry as the defendant. In the application, Det. Williams alleged that, on November 17, 2018 at 7:27p.m., he was notified of a shooting that occurred in the 1500 Block of Ramsay Street. Det. Williams was also notified that two individuals were shot at the location. When Det. Williams arrived, he assumed control of the crime scene. From his investigation, Det. Williams concluded that Mr. Terry was a suspect in the shooting.

Trial

After multiple postponements,[1] Mr. Terry's trial commenced on October 10, 2019 in the Circuit Court for Baltimore City. On the initial day of trial, a jury was empaneled, instructed, and sworn. **Trial Tr. 10/10/2019.**

[1] The trial was originally scheduled for June 5, 2019 but was postponed at the request of the State to provide supplemental discovery—the taped interview of Hailey Scarlett—to the defense. The succeeding July 30, 2019 trial date was postponed on the day of trial at the request of the assistant state's attorney who then provided supplemental discovery to the defense—approximately 800 jail calls allegedly made by Mr. Terry.

Second Day: October 11, 2019

Before opening arguments on October 11, 2019, the court ruled on Mr. Terry's motion to suppress a photo array and then addressed the State's Motion to Amend Witness List. During the hearing, the court examined transcripts that revealed that Mr. Terry may have made a statement to Det. Williams that was not provided to the defense—or the assistant state's attorney. The court instructed the assistant state's attorney to call Det. Williams into court that day for questioning and to bring his case folder.

Meanwhile, counsel presented opening arguments. The assistant state's attorney asserted that "[o]n November 17, 2018, at approximately 7:00 p.m. Danielle Baker and Hailey Scarlett were driving into the 1500 block of Ramsay Street in Baltimore City . . . [a]nd as they entered the block, Hailey Scarlett observed the defendant Lorenzo Terry." Ms. Scarlett had dated Mr. Terry in the past. The state's attorney contended that, about twenty-five minutes later, after Ms. Baker had gotten out of the car and was standing about half-way up the block, Mr. Terry fired seven shots down the street in her direction. Two bullets struck Ms. Baker, and another hit a bystander who happened to be coming out of a bar.

Following opening statements by Mr. Terry's counsel, the jury heard from two crime lab technicians, Cammie Alston and Kelly Figeroa, who testified about their examination of the crime scene. Following their testimony, the jury was excused, and Det. Williams took the stand during an in-camera closed hearing. Upon questioning, Det. Williams revealed that he had interviewed Mr. Terry at police headquarters:

[DEFENSE COUNSEL]: You didn't record this interview?

[DET. WILLIAMS]: It was recorded.

[DEFENSE COUNSEL]: Okay. And how did you record that?

[DET. WILLIAMS]: On a system inside headquarters.

[DEFENSE COUNSEL]: Okay.

[DET. WILLIAMS]: In a homicide office.

[DEFENSE COUNSEL]: Right. And that was via camera, correct?

[DET WILLIAMS]: It was.

[DEFENSE COUNSEL]: All right. And did you obtain a copy of that recording?

[DET. WILLIAMS]: As of yet, no, I have not.

[DEFENSE COUNSEL]: And did you provide that copy of that interview to Mr. Kim?

[DET. WILLIAMS]: No, I have not.

The assistant state's attorney followed up by asking Det. Williams why he had previously informed the State that he did not have a statement from Mr. Terry. Det. Williams responded, "at the time, I did not have my case folder. And I could not actually conclude that we had a tape-recorded interview."[2] Det. Williams also revealed that he had failed to produce the recorded interview of another witness by the name of Robert Rader.

[2] At this point, the judge asked Det. Williams how long he had been a detective, and after he responded "[a]pproximately 14 and a half, 15 years[,]" the judge asked Det. Williams if he had ever heard of the State's obligations under Maryland Rule 4-263(d). The following colloquy ensued:

(Continued)

The video interview of Mr. Terry was retrieved by Det. Williams and played in open court on October 11, 2019. The court recommended that the parties review the video interview because "it may impact the defense's ability to cross-examine and have

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[DET. WILLIAMS]: I have, Your Honor. May I say something also, please?

When Mr. Kim communicated with me regarding the interview or the -- um -- yeah whether or not I obtained the interview from Mr. Terry, I did not have my case folder. I was not in the presence of that information. And quite honestly, Your Honor, the interview I do recall being very short, very brief. Because -- I understand what I'm going to say -- um -- Mr. Kim has no knowledge of. But because Mr. Terry invoked his right and said that pretty much if you're here to talk about the girl getting shot, I don't know nothing about it.

[THE COURT]: Yeah, but that is not the point.

[DET. WILLIAMS]: I -- I -- I understand that.

[THE COURT]: This rule doesn't say if the detective thinks it is necessary. If the detective decides that it is not important, if the detective determines -- it doesn't say anything of that; does it?

[DET. WILLIAMS]: No, it does not.

[THE COURT]: And so you knew this case was going to start today, actually yesterday, right?

[DET. WILLIAMS]: Yes.

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[THE COURT]: And you're telling me you didn't read your case file before you came into court to testify?

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[DET. WILLIAMS]: No, I did not.

meaningful cross-examination." On the video, Det. Williams was leading the questioning. After verifying Mr. Terry's personal information, Det. Williams explained Mr. Terry's *Miranda* rights and what would constitute a waiver of those rights. The video revealed, in relevant part, the following exchange:

[DET. WILLIAMS]:	So do you know why you're here?
MR. TERRY:	No.
[DET. WILLIAMS]:	You have a warrant for your arrest.
MR. TERRY:	For what?
[DET. WILLIAMS]:	Attempted murder.
MR. TERRY:	For who? What?
[DET. WILLIAMS]:	A shooting that occurred at the end of last month specifically –
MR. TERRY:	(Unintelligible 15:11:43).
[DET. WILLIAMS]:	Hmm?
MR. TERRY:	I don't know nothing.

On the video, Det. Williams proceeded to question Mr. Terry about his lifestyle and whereabouts. Mr. Terry consistently responded that since he was released from prison, he barely left the house.

The State then played a video recording of Mr. Rader's interview with Det. Williams and Det. Macklin from November 18th, 2018 at 6:45 p.m., which also was not disclosed prior to trial. In the video, Mr. Rader explained to the detectives that he was in the neighborhood for a couple hours before the incident on November 17, 2018 occurred.

During the interview, Mr. Rader also stated that he knew the victim, Ms. Baker, because he used to have relations with her niece, Ms. Scarlett. Mr. Rader further explained that Ms. Baker "[w]asn't supposed to get shot." He informed the detectives that the he heard that the reason she was shot was "because somebody pushed her" in the way of the bullet. The court then instructed the parties that the court would hear argument on October 15 concerning the impact of these two statements and invited the parties to file motions beforehand.

Motion to Dismiss

Consistent with the court's instruction, Mr. Terry's counsel filed a "Motion to Dismiss with Prejudice for Discovery Violations and Failure to Disclose Witness Statements." The written motion averred that, pursuant to Maryland Rule 4-263(d), discovery was due to the defense on May 5, 2019**,** and that the State failed to produce any discovery for the following witnesses, pursuant to its discovery obligations:

a. Defendant: Lorenzo Terry interview at Police Headquarters - 12/13/18
b. State Witness: Robert Rader interview at Police Headquarters - Unknown date
c. State Witness: Hailey Scarlett interview at undisclosed location - 11/19/18
d. State Witness: Emily Watson interview at undisclosed location - Unknown date
e. Maria Moses interview at undisclosed location - 10/7/19

The motion also alleged that under Rule 4-263(d)(l), the State was required to disclose statements made by any State's witness relating to the charged offense, including Mr. Terry's statement and the statements by Robert Rader, Hailey Scarlett, Maria Moses, and Emily Watson. Statements in the possession of the Baltimore City Police, the motion

further charged, were considered to be in the State's possession for purposes of the State's discovery obligations under the Maryland rules.

The motion further urged that "the material that was subsequently disclosed by the Office of the State's Attorney is considered a source of Brady material pursuant to *Brady v. Maryland,* 373 U.S. 83, 87-88 (1963)," and that the duty to disclose under *Brady* is "automatic, mandatory, continuing, and subject to strict liability." The defense argued that they had initially requested all statements related to Mr. Terry and other witnesses, and had relied on the State's initial disclosure, indicating that "Defendant did not make an oral or written statement to a State agent that is known to the State." Accordingly, defense counsel claimed in the motion, the defense was misled into thinking that further inquiry was unnecessary. In sum, the defense argued that because the State failed to meet its affirmative duty to disclose Mr. Terry's statement and the statements of other witnesses, Mr. Terry "suffered unmitigated and irreparable prejudice" and that the only way to cure the violation was by "[d]ismiss[ing] the matter with prejudice, or alternatively, exclud[ing] the testimony of all the State's witnesses[.]"

October 15, 2019

The parties re-appeared in court on October 15, 2019 for a hearing on the motion to dismiss. In court, defense counsel repeated the arguments contained in the motion.

The court questioned defense counsel extensively about how the late-revealed video interviews prejudiced his client. The court asked, for example, since counsel was given a copy of Mr. Rader's statement, "why is that prejudicial now?" Mr. Terry's counsel responded:

> Your Honor, for – for a multitude of reasons. We have already started trial. I have given my opening statement. I have cross-examined two State witnesses, crime scene technicians. I have prepared for this trial. I have investigated to the full extent.
>
> * * *
>
> Mr. Rader's presence at the scene certainly could have helped Mr. Terry investigate. . . . I could have had an investigator or myself contact Mr. Rader to obtain information to see if he would speak with us. In fact, there could have been another individual there that was involved with the shooting and had nothing -- that Mr. Terry had nothing to do with it. So yes, it could be exculpatory with respect to Mr. Terry's involvement in the case. How do I know that without even having opportunity to speak to Mr. Rader? Not given an address, not given any information, in fact, having a taped interview where Mr. Rader is there on a separate related handgun matter.

The court also asked defense counsel how his client was prejudiced by Mr. Terry's late-revealed statement made to Det. Williams, and what options could cure the alleged prejudice:

> THE COURT: Well, I mean there are -- what are the -- what are the options that the [c]ourt has available to it when there is a discovery violation which you are claiming -- um -- materially affects the ability of the defense to have a fair trial?
>
> [DEFENSE COUNSEL]: Yes, Your Honor. I hate to start off with this word, because that is not what we want. Mistrial in this matter is not appropriate. Um -- given -- um -- Mr. Terry's –
>
> THE COURT: Really? It is an option though; isn't it?
>
> [DEFENSE COUNSEL]: It is an option. But we –
>
> THE COURT: You don't want -- you don't want a mistrial. You want a dismissal.
>
> [DEFENSE COUNSEL]: We would like a –

THE COURT: And you want a dismissal with prejudice so that this case can never be brought back.

[DEFENSE COUNSEL]: That is correct, Your Honor.

Defense counsel then explained that, although he did not believe the assistant state's attorney acted in bad faith, he highlighted that the relevant Maryland Rule does not require the court find that the State acted in bad faith. Consequently, the court questioned "[w]hat does it require?" In response, defense counsel first explained that under *Brady* "the State and the police department are one and the same . . . [t]hey're considered to be autonomous." Counsel then proclaimed:

> Now, Your Honor, the Court imposes a strict liability standard on that, whether the prosecutor's negligence, willfulness, or lack of bad faith in failing to produce exculpatory or other sort of information regarding discovery. The determination is whether the defendant's rights to due process were violated and whether he was prejudiced. And I think we have demonstrated that.

Following defense counsel's proffer, the court, referencing *Evans v. State*, 304 Md. 487 (1985), questioned counsel about the irreparable harm in the case when "there is an unintentional violation of the discovery rules":

THE COURT: Is there an irreparable -- kind of like, take a sheet and tear it. You can sew it back together if you want. But that sheet is still torn; isn't it?

[DEFENSE COUNSEL]: Yes, Your Honor. It is.

THE COURT: Okay. So what is the tearing here? What is the irreparable harm to the defense that you can't -- we can't – we can't piece it back together? We can't glue it back. We can't fix it.

. . . Because that is what you get if – for this dismissal that you're looking for. What is – what is that?

The court then asked counsel to "tell me one thing that you didn't do or would have done had you had these statements."

Defense counsel explained that Mr. Terry faced irreparable harm because he was not able to "properly develop this case[.]" Counsel highlighted that "in that statement that we heard in court in camera, Mr. Terry made multiple statements regarding alibi situations." Because of these statements, counsel averred that "the defense waived our alibi witnesses" and "decided strategically, at this point, to withdraw our witnesses."

Citing *Thomas v. State*, 397 Md. 557, 570-71 (2007), the court articulated the considerations[3] that trial courts should weigh when addressing appropriate sanctions for discovery violations: "[t]he reasons why the disclosure was not made, the existence and amount of any prejudice to the opposing party, and the feasibility of curing any prejudice with a continuance and any other relevant [circumstances]." The court explained that it would not fault the assistant state's attorney for the failure to disclose the discovery because "it [was] obvious why it wasn't disclosed." Having just reviewed with defense counsel the question of prejudice to Mr. Terry, the court "skip[ped] to number three" to analyze the feasibility of curing any prejudice.

The court began by asking the State, "[h]ow would you propose that I cure what has happened in this case?" The court pointed out, that there were two statements "made to

[3] The four considerations articulated by the Court of Appeals in *Thomas* were: "(1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Thomas,* 397 Md. at 570-71.

law enforcement and to the State, one by Mr. Rader and one by Mr. Terry, that were disclosed after the detective has already testified . . . [and] opening statements to the jury have been made." Based on both statements, the court requested the State to "[t]ell me how I cure the prejudice now."

First, the assistant state's attorney responded, "[y]our Honor, everything regarding the statements from Mr. Rader and from the defendant, nothing of that has come out either in opening or from the witnesses." The court then requested the assistant state's attorney direct his response to address, "[h]ow does defense counsel prepare his defense right now when the two statements – let's just say Mr. Rader's suggest that someone else may have had a motive to have shot and maybe that someone else made a mistake?" The State's response set off the following discussion:

> [THE STATE]: Your Honor, first, the motive that is discussed by Mr. Rader is the exact same motive that has been discussed throughout the entire -- through all the other evidence.
>
> THE COURT: Oh, no, absolutely not. I never heard that Box Head might have been out there, that Box Head might have a motive to shoot someone. I didn't hear any of that in any of the previous testimony. Nor did I hear from anyone that someone named Robert Rader was at the scene and may have seen the shooting or might have been out there.
>
> I never heard before that that there were other witnesses to the shooting, that Rader knew that there were other witnesses in the community, that he had physically been out there at the time of the shooting. I didn't hear any of that.
>
> [THE STATE]: Well, Your Honor, those witnesses haven't testified yet. But all that information was provide -- otherwise provided to the defense.

* * *

THE COURT: [Mr. Rader's] statement was never provided to the defense.

[THE STATE]: Well, that statement, Your Honor. But the other -- all those other facts that Your Honor is discussing --

THE COURT: But how does he prepare? How does he prepare his defense when a prime witness to the shooting is never disclosed to him?

In response, the assistant state's attorney asserted that Mr. Rader was not a key witness to the case, because "[h]e was unwilling to be committal to anything other than the fact that he said he was generally outside." The court then explained that the prejudice was not at trial "but in preparation for trial" because the defense requires knowledge of the State's material to determine the defense's theory of the case. The court surmised that, when information is withheld from the defense, the defense loses "the ability . . . to come up with an alternative theory of the case" and in even determining whether to "put your client on the witness stand, [because] you have to know what he said." Having clarified the potential prejudice, the court then again requested the State answer:

> [H]ow does this failure to disclose prejudice the defendant in such a way that it can be cured by something I can do right now? What would you suggest that I could do right now to cure this defect?

The assistant state's attorney responded that he did not "think" that the defense's theory of the case—that "Mr. Terry was not there for the shooting"—had changed.

The court noted that this detail "had changed" and impacted the potential defense. Without the benefit of this information, the court asserted, defense counsel was required to make "a strategic decision about [Mr. Terry's alibi defense] based on what he knew at that

time," including whether to include alibi witnesses or have Mr. Terry take the stand. The court concluded:

> Okay. . . , you can't get past this. You can't get past it. This is so egregious that nothing you can say can mount this wall. A sworn statement of the length and the depth of the statement by Mr. Terry under oath recorded where his *Miranda* was given not disclosed in an attempted murder trial where the defendant is looking at double life, you can't get past that as much as you try.
>
> Because you're not the defense attorney, and neither am I. And you don't know what the defense would have done with that statement or how they may have used it or how they may have attempted to use it on opening, on the development of their theory, on direct and cross of [D]etective Williams. And I say direct and cross, because they could have called him as their own witness to talk about what other avenues the detective took to look for the real culprit in quotes. You – you can't. It is insurmountable.

The court then analyzed potential remedies to resolve the failure to disclose. First, the court refused to exclude the State's witnesses as a remedy stating: "I can't exclude evidence in a situation where the very evidence itself could be used to exculpate the defendant." The court further explained to the State, "to exclude the evidence is not helpful. To exclude Rader's statement is not a remedy. Again, because to exclude that evidence could impede the defense opportunity to exculpate his client." On the other hand, the court reasoned that it could not simply admit the statements into evidence.

> Admitting it into evidence is not helpful because the defense has not had an opportunity. In addition, there were discussions pretrial where, I'm sure, defense counsel discussed the evidence with his client and the strength or weakness of the State's case.
>
> And I can't fix that because I couldn't give to the defense -- rewind and have them discuss what the evidence is against him and how and what choices he might want to make in terms of accepting or declining a plea offer, because that is his job. His job is to talk to his client about any offers you may have made. And even to come to you with an offer if he felt as though his client was facing insurmountable odds. That, I can't fix either.

The court explained that, at this point in the proceedings, there would not be "enough time to afford defense counsel an opportunity to rethink his strategy." The statements, the Court surmised, could require the defense to do further research or investigation, including, potentially "finding [a] witness now that [the defense] knows that that witness is so critical."

The assistant state's attorney suggested that the potential prejudice to Mr. Terry was lessened because "when it comes to the meat of what actually was relevant to this case, everything was already known to [the] defense." The court disagreed. "We're juggling with the life and the constitutional rights of the defendant." The court expounded:

> In this situation where the risk and the stakes are a lot more than just win or losing or some chips on the table, we're talking about a man's life and his right to be able to prepare a defense with the knowledge that all the cards are in the pile, every single one of them.

The judge then concluded her ruling from the bench, determining first that the evidence is "material" and "extremely relevant" to both trial preparation and the actual trial itself. Second, the court explained to defense counsel that the prejudice did not warrant dismissal:

> Counsel, I know you want the most egregious sanction. And you wouldn't be the excellent lawyer that you are if you didn't ask for that. But I'm going to tell you right now that I don't believe that this was of a bad faith prejudice that would warrant a dismissal with prejudice. I don't think there is any evidence in this record that [the assistant state's attorney] was knowledgeable or aware of any of the information.

However, the court determined that the timing of the disclosure clearly prejudiced the defense's development of its theory of the case, the advice that Mr. Terry received from

his counsel, his trial preparation, and "even [his counsel's] opening statement . . . to the jury."

While the court was "mindful" that Mr. Terry's counsel sought a dismissal, the court found that the prosecutor was not "behind this failure to disclose." The court denied the motion to dismiss and declared a mistrial, finding that the nondisclosure was not "an egregious attempt by the State to avoid [Mr. Terry] getting the evidence that [he was] entitled to[,]" but that the nondisclosure violated Mr. Terry's right to due process and warranted a new trial. The court then instructed that the case would "immediately start again after being rescheduled."

Second Trial

January 7, 2020

Mr. Terry's second trial began on January 7, 2020. At the beginning of the proceedings, defense counsel moved to dismiss the case on double jeopardy grounds. In support of the motion, counsel argued that double jeopardy had attached during the first trial because a jury had been sworn-in and the proceedings were underway. Counsel further asserted that the previous court erred in granting a mistrial *sua sponte* because there was no manifest necessity to do so. Consequently, counsel argued, the case should be dismissed on double jeopardy grounds.

According to defense counsel, there were other sanctions that the prior court could have imposed rather than declare a mistrial. Apart from dismissing the case with prejudice—Mr. Terry's preferred sanction—counsel proffered that Det. Williams could have been excluded from testifying due to his failure to disclose several witness statements.

Counsel asserted that the State could have continued the original trial with its remaining witnesses, including one crime lab tech and a firearms examiner.

The court then asked both parties whether there was any articulation on the record from the prior judge explaining the grounds for mistrial. Defense counsel responded, based on his notes, that the new information "would have changed [defense counsel's] theory and[/]or [his] ability to defend." The State likewise explained that the court determined:

> [T]he failed disclosure of the Defendant's statement in particular prejudiced defense such that they were not able to prepare properly for the case and therefore [the court] found manifest necessity to declare a mistrial and then reset the case, which would then, as Your Honor know, would help cure that prejudice[.]

The court articulated that its "concern right now is how and why did [the former trial judge] come to the conclusion she did":

> [I]f there's a legal basis for [the former trial judge] to conclude there was manifest necessity, then it's not double jeopardy. And if [the former trial judge] failed to articulate it or if she just plain was wrong . . . then, you know, I have to rule in favor of the defense.

In order to render a decision on Mr. Terry's motion, the court reviewed the audio recording of the lower court proceedings. Following the recess, the court reached a preliminary finding based on its review of the recording from the October 2019 trial. First, the court pointed out that the prior judge "never said the implicit exact words there is manifest necessity." Instead, "[s]he all but said that. She found prejudice . . . that requires the suspension of that particular trial, didn't find enough prejudice such that would require dismissal of the matter." The court determined, "with the explanations given by [the previous trial judge] that there was in fact a manifest necessity for a mistrial among the

options she had at that time, it seems to be a reasonable remedy for the situation that presented itself." In order to properly address the motion and render a final decision, however, the court continued the trial to the next day.

January 8, 2020

When the parties reconvened the next day, the court declared its ruling on Mr. Terry's motion to dismiss:

> **I've concluded not to (A) dismiss this matter; and (B) having reviewed at length [the previous trial judge]'s deliberations and rationale for the declaration of the mistrial, I found no error there.**
>
> In fact, I would have done much the same thing. And therefore, will deny that part of the motion also made by defense in support of barring this prosecution for double jeopardy reasons in as much as I would have found, as Judge Heard had found, there was in fact manifest necessity for the declaration of the mistrial in that matter. So we can now proceed to trial.

(Emphasis added).

Following the court's decision, Mr. Terry notified the court that he would file an interlocutory appeal and requested that the court stay the proceeding, where upon the court stayed the proceeding. Mr. Terry then filed a timely appeal on January 10, 2020.

STANDARD OF REVIEW

We review the trial court's decision to grant a mistrial for abuse of discretion. *State v. Baker*, 453 Md. 32, 46 (2017). "It is well-settled that a decision to grant a mistrial lies within the sound discretion of the trial judge and that the trial judge's determination will not be disturbed on appeal unless there is abuse of discretion." *Id*. (quoting *Simmons v. State*, 436 Md. 202, 212 (2013)). To determine whether an abuse of discretion has

occurred, we "look to whether the trial judge's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.*

DISCUSSION

I.

Manifest Necessity and Double Jeopardy

A. Parties' Contentions

Before this Court, Mr. Terry contends that the circuit court erred in declaring a mistrial because "there was no manifest necessity." Relying on *Baker*, 453 Md. at 49, Mr. Terry argues none of the three requirements for finding manifest necessity were present. First, there was no '"high degree' of necessity for the mistrial" because the State "did not oppose any of the feasible alternatives for a mistrial" and "merely opposed dismissing the case with prejudice as 'too severe a sanction.'" Second, according to Mr. Terry, the court did not "explore reasonable alternatives for a mistrial," but instead "merely chastised the State for failure to disclose the statements to the defense." Third, the State "failed to prove that there were reasonable alternatives to a mistrial" because it "did not prove that the prejudice suffered by Mr. Terry could not be cured by simply excluding its witnesses."

Relying on *Derr v. State*, 434 Md. 88, 124-25 (2013), and its interpretation of *Brady v. Maryland*, 373 U.S. 83 (1963), Mr. Terry argues that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Derr*, 434 Md. at 124-25 (quoting *Brady*, 373 U.S. at 87). According to Mr. Terry, because Maryland Rule 4-263 requires disclosure of *Brady* material by the State,

irrespective of the State's good faith or intent, the "failure to disclose the statements violated Mr. Terry's constitutional right to due process." Mr. Terry contends that the prosecutor's ignorance of the undisclosed statements is irrelevant, and thus should not have been considered in the trial court's determination of whether to issue a mistrial.

The State counters that the trial court properly exercised its discretion by declaring a mistrial before the jury heard any fact witnesses at Mr. Terry's first trial. First, the State asserts that "there is no requirement that courts say the words 'manifest necessity' before declaring a mistrial, and trial courts can declare a mistrial *sua sponte*." Second, the State avers that "the trial court here discussed its reasoning at length, including the available alternatives to either dismissing the case or declaring a mistrial." According to the State, "the record here shows that the court investigated the circumstances of the discovery violation and the prejudice to [Mr.] Terry and gave the parties many opportunities to explain their positions before it ruled on [Mr.] Terry's request for dismissal."

Mr. Terry replies that the State's contention that the court discussed alternatives to a mistrial at length is "baseless." According to Mr. Terry, the court did not "adequately consider[] excluding the testimony of the State's witnesses as an alternative to declaring a mistrial." Furthermore, Mr. Terry asserts that there was not "substantial detail on the record" supporting the court's decision to grant the mistrial but only limited commentary: one piece discussing the exclusion of Mr. Rader's testimony, and a second discussing the "alternative remedy of exclusion . . . *after* [the court's] declaration of a mistrial." (Emphasis in original).

B. Attachment of Jeopardy

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, applicable to the States through the Fourteenth Amendment, provides, in relevant part, that "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb[.]" The Court of Appeals has recognized that, while there is "no double jeopardy clause in the Maryland Constitution, . . . Maryland common law double jeopardy principles also protect an accused against twice being put in jeopardy for the same offense." *Simmons*, 436 Md. at 213 (citation and quotation marks omitted). Jeopardy generally does not attach, however, until a jury "has been empaneled and sworn." *Id.* at 213. While the attachment of jeopardy generally bars a retrial for the same offense, it does not establish that a subsequent trial will *always* be barred. *See Hubbard v. State*, 395 Md. 73, 89 (2006) (explaining that "[r]etrial is not automatically barred . . . when a criminal proceeding is concluded after jeopardy attaches but without resolving the merits of the case." (referencing *Arizona v. Washington*, 434 U.S. 497, 505 (1978))).

In *Simmons*, the Court of Appeals instructed, that "[w]hen a mistrial is granted over the objection of the defendant, double jeopardy principles will not bar a retrial if there exists 'manifest necessity' for the mistrial. In that situation, the prosecutor bears the heavy burden of demonstrating manifest necessity." 436 Md. at 213-14 (footnote omitted).

Here, at the time the trial court declared a mistrial, the jury had been empaneled and sworn, so jeopardy had attached. *Hubbard*, 395 Md. at 90. Additionally, the record reflects that a mistrial was granted in the initial proceeding over Mr. Terry's objection. Therefore,

we must examine whether the trial court correctly found manifest necessity in granting a mistrial in the October 2019 proceedings.

C. Determining Manifest Necessity

"Manifest necessity" justifying a mistrial only exists if "1) there was a 'high degree' of necessity for the mistrial; 2) the trial court engaged 'in the process of exploring reasonable alternatives' to a mistrial and determined that none was available; and 3) no reasonable alternative to a mistrial was, in fact, available." *State v. Baker*, 453 Md. 32, 49 (2017) (internal citations omitted). While we "have an obligation to satisfy . . . that . . . the trial judge exercised 'sound discretion' in declaring a mistrial[,] the absence of an explicit finding of 'manifest necessity' . . . does not render the trial court's ruling constitutionally defective." *Id.* (cleaned up) (quoting *Washington*, 443 U.S. at 516-17). Rather, we review whether "the trial judge acted responsibly and deliberately, and accorded careful consideration to the defendant's interest in having the trial concluded in a single proceeding." *Id.* (cleaned up) (quoting *Washington*, 434 U.S. at 516).

"[I]n order to determine manifest necessity to declare a mistrial, the trial judge must weigh the unique facts and circumstances of each case, explore reasonable alternatives, and determine that no reasonable alternative exists." *Quinones v. State*, 215 Md. App. 1, 17 (2013). If "reasonable alternatives to a mistrial, such as a continuance, are feasible [to] cure the problem," retrial is barred by the Fifth Amendment. *Id*. at 18 (quoting *Cornish v. State*, 272 Md. 312, 320 (1974)). On the other hand, if the court's action "is necessary to protect the interest of the defendant," *Cornish*, 272 Md. at 319, or the court finds that a trial error will almost certainly result in reversal upon appeal, *State v. Crutchfield*, 318 Md. 200,

209 (1989), a mistrial is permissible. "To meet the 'high degree' of necessity, the Supreme Court has recognized that there must be no reasonable alternative to the declaration of a mistrial." *Hubbard*, 395 Md. at 91. Accordingly, in analyzing manifest necessity, the first and third factors are often examined in conjunction. *Id.*

D. Analysis

We apply the foregoing principles in our analysis of the record on appeal and conclude that the trial judge did not abuse her discretion in declaring a mistrial based on manifest necessity.

a. *Baker* Factor 2: Court's Exploration of Reasonable Alternatives

We begin with the second factor of the *Baker* test and review the trial court's process of exploring reasonable alternatives to a mistrial. *See Baker*, 453 Md. at 49. Even a brief review of the record shows that the court explored—and thoroughly examined—potential alternatives to a mistrial. First, the court requested that Mr. Terry's counsel detail the various options available to the court to remedy the prejudice which "materially affects the ability of the defense to have a fair trial[.]" Defense counsel advised that he "hate[d] to start off with" the potential remedy of a mistrial, and instead proposed that the court dismiss the case entirely. The court then explored with defense counsel, citing *Evans v. State*, 304 Md. 487 (1985), the question whether Mr. Terry was irreparably harmed such that dismissal, rather than a mistrial, was required. Defense counsel explained how his client was harmed because he was not able to "properly develop this case[.]"

Next, the court asked the assistant state's attorney how he could "cure the prejudice now." The state's attorney proposed, first, that the prejudice was minimal, and that the

additional discovery would not impact any potential defense, implying that the court would not need to impose a harsh remedy to cure any prejudice. After further discussion, however, the court pointed out how the failure to inform the defense of the additional statements had impacted the ability of the defense to prepare their case. Consequently, the court concluded that the failure to disclose the statements was "so egregious that nothing [the assistant state's attorney could] say [could] mount this wall."

Then, considering the potential prejudice, the court analyzed potential remedies to resolve the failure to disclose. These included: excluding the State's witnesses; simply admitting the statements into evidence; a mistrial; and dismissal of the case. While the court did, rightly, criticize the State's failure—and particularly Det. William's failure—to disclose the statements, the court focused on how to remedy the prejudice that the late disclosure had on Mr. Terry. Clearly, the court "engaged in the process of exploring reasonable alternatives to a mistrial and determined that none was available." *Baker*, 453 Md. at 61.

b. *Baker* Factors 1 and 3: High Degree of Necessity and Actual Alternatives

Examining the record under the first and third *Baker* factors, we discern no abuse of discretion in the court's determinations that a mistrial was necessary, and that no reasonable alternative was available.

In analyzing whether a mistrial was necessary, the court used its discretion to determine the appropriate sanction for the State's discovery violation. The State conceded that it failed to provide the disclosures required under Maryland Rule 4-263. Accordingly,

intertwined with the court's discretion to grant a mistrial, the trial court analyzed the appropriate sanction for the State's discovery failure.

The Court of Appeals clarified in *Thomas v. State* that "[t]o implement the objectives of [] Rule [4-263], it is within the discretion of the trial court to impose sanctions if the Rule is violated." 397 Md. 557, 570 (2007). Rule 4-263(n) provides:

> If at any time during the proceedings the court finds that a party has failed to comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

The *Thomas* Court further instructed that: "In exercising its discretion regarding sanctions for discovery violations, a trial court should consider: (1) the reasons why the disclosure was not made; (2) the existence and amount of any prejudice to the opposing party; (3) the feasibility of curing any prejudice with a continuance; and (4) any other relevant circumstances." *Id.* at 570-71 (footnote omitted). The Court directed that "in fashioning a sanction, the court should impose the least severe sanction that is consistent with the purpose of the discovery rules." *Id.* at 571 (collecting cases).

Consistent with the directive in *Thomas*, the trial court in this case thoroughly considered each factor in fashioning the appropriate sanction. First, the court reasoned that it was "obvious why [the statements weren't] disclosed." Specifically, Det. Williams failed to provide the interviews to the assistant state's attorney. Defense counsel conceded that

the failure to disclose did not result from the bad faith of the assistant state's attorney. The court likewise determined that the assistant state's attorney was not "behind th[e] failure to disclose," and the nondisclosure was not an egregious attempt to avoid providing the information.

Second, the court analyzed how the late-revealed statements ultimately prejudiced Mr. Terry. After questioning defense counsel and the State extensively regarding the potential prejudice, the court concluded that the problems caused by the non-disclosure were insurmountable because defense counsel was required to make "a strategic decision about [Mr. Terry's alibi defense] based on what he knew at that time," including whether to include alibi witnesses or have Mr. Terry take the stand, without the benefit of this information. In short, the late-disclosed statements potentially prevented Mr. Terry and his counsel from determining the proper theory of the case and preparing an effective defense.

Third, the court considered "the feasibility of curing any prejudice with a continuance" and determined that this was not a reasonable alternative to remedy the failure to disclose. *See Thomas*, 397 Md. at 571. Specifically, the court explained that, at that point in the proceedings, a continuance would not have sufficed as there would not have been "enough time to afford defense counsel an opportunity to rethink his strategy," since the statements may have required the defense perform further investigation and research.

The court considered other alternatives. For example, the court considered excluding the evidence but reasoned that it could not "exclude evidence in a situation where the very evidence itself could be used to exculpate the defendant." Alternatively, the court

determined that it could not simply admit the evidence during the trial because it was impossible to "rewind" defense counsel's ability to discuss the evidence with Mr. Terry before trial, review any potential plea offers, or determine the defense's trial strategy.

Mr. Terry contends that the court failed to analyze sufficiently either of the potential alternatives that he raised below: (1) dismiss the case with prejudice; or (2) exclude the State's witnesses. We disagree. First, the court carefully considered his motion to dismiss and found that the nondisclosure was not "an egregious attempt by the State to avoid [Mr. Terry] getting the evidence that [he was] entitled to" but that the nondisclosure warranted a new trial. Second, consistent with its review of the potential use of the evidence, the court determined that it could neither admit or exclude the statements and that exclusion of the State's witnesses was not a reasonable alternative. The court determined that neither sanction proposed by Mr. Terry fit the violation, given the court's finding that the State did not violate its discovery obligations in bad faith. *C.f. Taliaferro v. State*, 295 Md. 376, 390-91 (1983) (noting that the trial court has discretion to craft a sanction to fit the seriousness of the discovery violation with regard to witnesses).

Finally, regarding "any other relevant circumstances," the circuit court explained that, if it declined to a grant a mistrial, "justice would not prevail." Consistent with its charge to fashion the least severe sanction under the discovery rules, we hold that the trial court correctly determined that neither dismissal of the case nor exclusion of evidence were appropriate sanctions. The discovery violation was not willful, and the prejudice to the defense could be remedied with a mistrial to provide the defense with time to prepare its case and to present its evidence and arguments to a new jury. Accordingly, we hold that

the circuit court did not abuse its discretion in its consideration of the *Thomas* factors in fashioning the appropriate discovery sanction in this case.

Returning to factors 1 and 3 of *Baker,* and without repeating our analysis above, we conclude that the prejudice from the late disclosures was high, as it potentially impacted Mr. Terry's theory of the case, presentation of evidence, and overall strategy. The prejudice prevented Mr. Terry's right to a fair trial and, because of this prejudice, none of the other alternatives proposed by the State or considered by the court could have repaired the damage from the late disclosure. *See Neal v. State*, 272 Md. 323, 326 (1974) (noting that a mistrial is appropriate once the trial court perceives that a trial cannot proceed). As a final point, this Court cannot contemplate an alternative that would have remedied the prejudice to Mr. Terry without imposition of "a windfall to the defense." *Thomas*, 397 Md. at 573.

In short, the remedy elected by the circuit court was tailored to cure the harm to the defense without granting a windfall to either party or excusing bad faith by the State. As the *Baker* factors were satisfied, we hold that manifest necessity supported the declaration of a mistrial.[4] Accordingly, the trial court in the underlying case did not err in denying Mr. Terry's motion to dismiss because double jeopardy principles will not bar Mr. Terry's new trial.

[4] Mr. Terry contends that the "court's failure to even mention the words 'manifest necessity' also demonstrates that the court did not explore reasonable alternatives to a mistrial." However, as we explained, "absence of an explicit finding of 'manifest necessity' does not render the trial court's ruling constitutionally defective." *Baker*, 453 Md. at 49 (cleaned up). As we detailed above, the court thoroughly reviewed the relevant factors and explained its reasoning.

II.

Discovery Sanction

Mr. Terry contends, in the alternative, that the court violated his due process rights by misapplying the factors for sanctioning a discovery violation. Although, pursuant to Maryland Rule 4-263(h)(1), the circuit court was empowered to sanction the State when it failed to disclose all exculpatory and impeachment information "[w]ithin 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court," according to Mr. Terry, the court abused its discretion by: "overemphasiz[ing] the State's alleged ignorance of the undisclosed statements"; and failing to "adequately consider the feasibility of curing the prejudice in any way other than declaring a mistrial." Consequently, he asserts that the court's decision to declare a mistrial, rather than issuing an alternative sanction, resulted in prejudice to Mr. Terry.

In response, the State asserts that there is no right to an interlocutory appeal on a discovery ruling to this Court. However, the State contends that if this Court does review this matter, we should find that Mr. Terry's argument fails on the merits. Mr. Terry replies that because the State's discovery violation "is inexorably intertwined [with] the court's (implied) finding of a manifest necessity for a mistrial," the issue is properly before this Court.

We hold that Mr. Terry is not entitled to an interlocutory appeal on this issue because the court's discovery ruling was not a final judgment and did not fall within one of the exceptions to the final judgment rule. Although, as discussed above, the facts and grounds for determining whether a mistrial was appropriate in this case are indeed intertwined with

the discovery violation, this does not render the ruling on the discovery violation a separate, appealable order.

Generally, an appeal will only lie from a final judgment. Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article, § 12-301. "[T]o constitute a final judgment, a trial court's ruling 'must either decide and conclude the rights of the parties involved or deny a party the means to prosecute or defend rights and interests in the subject matter of the proceeding.'" *Harris v. State*, 420 Md. 300, 312 (2011) (citation omitted). Our Court of Appeals has recognized "three well-identified, but infrequently sanctioned, limited exceptions to the final judgment rule which permit appellate review before a final judgment has been rendered": (1) "appeals from interlocutory orders specifically allowed by statute"; (2) "immediate appeals permitted under Maryland Rule 2-602"; and (3) "appeals from interlocutory orders allowed under the common law collateral order doctrine." *Id.* at 313-14 (quoting *Falik v. Hornage*, 413 Md. 163, 175-76 (2010)). "[D]iscovery orders 'being interlocutory in nature, are not ordinarily appealable prior to a final judgment terminating the case in the trial court.'" *Id.* at 314 (quoting *In re Foley*, 373 Md. 627, 634 (2003)).

Here, Mr. Terry has not offered—and we have not found—a statute that permits his appeal, and he has not explained how his appeal is permitted under Maryland Rule 2-602. Nor is the issue appealable under the collateral order doctrine, which

> treats as final and appealable interlocutory orders that (1) conclusively determine the disputed question; (2) resolve an important issue; (3) resolve an issue that is completely separate from the merits of the action; and (4) would be effectively unreviewable on appeal from a final judgment. The

> collateral order doctrine is a very narrow exception to the final judgment rule, and each of its four requirements is very strictly applied in Maryland.

Falik, 413 Md. at 177 (quoting *St. Joseph Med. Ctr. v. Cardiac Surgery Assocs.*, 392 Md. 75, 86 (2006)). Generally, "interlocutory discovery orders do not meet the requirements of the collateral order doctrine and are not appealable under that doctrine." *Harris*, 420 Md. at 314 (quoting *Falik*, 413 Md. at 177).

Consistent with our Courts' prior rulings, a discovery order generally does not comply with at least two requirements of the collateral order doctrine because, first; they are not separate from the lawsuit but are "aimed at ascertaining critical facts upon which the outcome of the . . . controversy might depend" and; second, they are "effectively reviewable on appeal from a final judgment" by this Court. *Falik*, 413 Md. at 177 (citation omitted). Mr. Terry does not clarify how his appeal of the discovery ruling meets the requirements of the collateral order doctrine. Even if the discovery ruling were properly before us, for the reasons stated in our discussion above, we would conclude that the court thoroughly considered each factor outlined in *Thomas v. State*, 397 Md. 557, 570-71 (2007), in fashioning an appropriate sanction.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.